No. 78-1640

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In the Supreme Court of the United States

OCTOBER TERM, 1978

BELL & HOWELL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is not yet reported. The Board's decision and certification of representative (Pet. App. A28-A36) is reported at 213 N.L.R.B. 407. The Board's decision and order in the unfair labor practice proceeding (Pet. App. A37-A46) is reported at 220 N.L.R.B. 881. The Board's supplemental decision and order (Pet. App. A47-A59) is reported at 230 N.L.R.B. 420.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1979. The petition for a writ of certiorari was filed on April 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly determined that charges of sex discrimination, raised by an employer in opposition to the certification of a union as a collective bargaining representative, should be adjudicated in an unfair labor practice proceeding against the union rather than in a hearing on the question of certification.

STATEMENT

1. In April 1973, Local 399, International Union of Operating Engineers (Local 399), petitioned the National Labor Relations Board for a representation election among the stationary engineers employed at petitioner's plant in Lincolnwood, Illinois (Pet. App. A3). The election resulted in seven votes for Local 399, and one against (*id.* at A28). After the election, petitioner filed a motion to disqualify Local 399 as the collective-bargaining representative, alleging that it had engaged in various practices that discriminated against women (*ibid.*).[1] In September 1974, the Board certified Local 399 as the collective bargaining representative. It declined to adjudicate the issues raised by petitioner's motion to disqualify the union on the basis of alleged sex discrimination (Pet. App. A28-A34).[2]

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[1]Petitioner charged generally that there was an absence of female stationary engineers in the Chicago area which was attributable to Local 399's discriminatory policies. Petitioner also charged that Local 399 had no female officers or business representatives and that an informal survey showed that it had no female members. Petitioner further alleged that Local 399 awarded certain death and maternity benefits on a sex-discriminatory basis (Pet. App. A29).

[2]An earlier decision of the Board, *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974), held that charges of discrimination should be adjudicated in a certification proceeding. Members Fanning and Penello dissented from the holding in *Bekins*, concluding that such charges should be resolved in unfair labor practice proceedings against the union or through proceedings brought under Title VII of the Civil Rights Act. 211 N.L.R.B. 145-149. In the present case, members Penello and Fanning adhered to their position in *Bekins*. Member Kennedy filed a concurring opinion, concluding that "the Board should [not] entertain an allegation that a labor organization discriminates on the basis of sex in a precertification representation proceeding" (*id.* at A32).

Petitioner refused to bargain with Local 399 and the union filed unfair labor practice charges under Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). The Board granted summary judgment against petitioner and entered a bargaining order (Pet. App. A37-A46). In a supplemental decision and order (*id.* at A47-A59), the Board reaffirmed its conclusion that petitioner's sex discrimination charges should be presented in an unfair labor practice proceeding, relying on its recent decision in *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977). In *Handy Andy*, the Board (Member Jenkins dissenting) over-ruled the *Bekins* case (discussed in note 2, *supra*) and announced that it would no longer consider charges of sex or racial discrimination before certifying petitioning unions as collective bargaining representatives.[3]

2. The court of appeals affirmed the Board's decision (Pet. App. A1-A27), concluding that the National Labor Relations Act does not require the Board "to consider allegations of discrimination prior to certifying a victorious union, at least where the proffered evidence of discrimination relates to past union misconduct outside the bargaining unit that the union seeks to represent" (*id.* at A19-A20).[4] The court

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[3]For the convenience of the Court, we have appended to this brief a copy of the decision in *Handy Andy*.

[4]The court added (Pet. App. A22 n.46): "We do not decide at this time whether a different result is required where the union's constitution or by-laws, or explicit conduct in a representation

pointed out that "[p]ermitting an employer to inject allegations of discrimination into a representation proceeding would tend to undermine [the protections] of the Act. Often an employer's allegations will require the Board to conduct extensive investigations. While these inquiries are carried out, the employees' choice of a representative is thwarted, and the delay may prove an effective tactic for eroding the union's support in the unit" (*id.* at A15; footnote omitted). The court added that the statutory purpose promptly to certify elected bargaining representatives could be fully accommodated with the goal of preventing discrimination through strict enforcement of the requirement of fair representation by collective bargaining agents under Sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act, 29 U.S.C. 158(b)(1)(A), 158(b)(2), and 158(b)(3) (*id.* at A17).

In rejecting petitioner's contention that pre-certification adjudication of claims of discrimination is required to eliminate discriminatory practices, the court of appeals noted that denial of certification was not a remedy well suited to achieve that purpose (Pet. App. A17-A18; footnotes omitted):

> First, denying certification or withholding a bargaining order from a discriminatory union may be an ineffective remedy for union discrimination. These sanctions will have no effect on unions that are strong enough to establish collective bargaining relationships with employers without recourse to the Board.
>
> Second, these sanctions are at odds with the remedial focus of the Board's authority. At best, denying certification or withholding a bargaining order will prevent future discrimination in the unit that the union seeks to represent. That sanction provides no remedy for those who are already victims of the union's discrimination. * * * Finally, to give the Board responsibility for investigating allegations of past union discrimination that occurred outside the unit for which the union seeks certification would unnecessarily duplicate the functions of the EEOC. The broader scope of the EEOC's investigative and remedial authority, its expertise in detecting subtle and complex forms of discrimination, and its single-purpose anti-discrimination mission combine to make the EEOC a preferable vehicle for eliminating union discrimination.

The court of appeals also rejected petitioner's assertion that certification of a union charged with prior acts of sex discrimination would "significantly involve" the federal government in such discrimination in contravention of the Fifth Amendment. The court pointed out that "[f]ar from authorizing and encouraging discrimination, certification subjects the union to additional sanctions for any future discrimination," including cease and desist orders and orders for monetary compensation for victims of discrimination (*id.* at A21).

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election, establish that the union will discriminate in the unit in question." The court noted that petitioner "has not alleged that the local's by-laws exclude women, nor that the union in its campaign promised to discriminate if selected as exclusive bargaining representative." Moreover, while the Union's "governing instruments" provide for the payment of "maternity benefits to 'dependent wives' but not 'female employees' " and of a "death benefit to 'widows' but not 'widowers,' " petitioner "offered no evidence that 'widowers' or 'female employees' had or would in fact be denied such benefits discriminatorily * * *" (*id.* at A23 n.46).

ARGUMENT

1. The decision below is the first decision of a court of appeals to review the rule prescribed by the Board in *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977). Under that decision, which was applied by the Board in the present case, charges of discrimination may not be adjudicated at the certification stage, but rather must be presented in unfair labor practice proceedings before the Board, in Equal Employment Opportunity Commission proceedings, or in private litigation brought by victims of discrimination. The Board has determined that this approach will provide effective sanctions against discrimination without retarding the certification of elected bargaining representatives and without interfering with the statutory right of employees to bargain collectively.

Although, as petitioner contends (Pet. 6-7), the decision below conflicts with the decision of the Eighth Circuit in *NLRB* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (8th Cir. 1973),[5] that decision was rendered without benefit of the Board's analysis in *Handy Andy*. The court in *Mansion House Center* had no opportunity to consider the adequacy of the rationale that now has been delineated by the Board for its procedure to accommodate the rights of fair representation and self-determination within the bargaining unit. If, as *Handy Andy* demonstrates, both of those rights can be adequately protected through the procedure that the Board has prescribed, there is little basis for inferring that the Eighth Circuit will continue to adhere to its interpretation in *Mansion House*

[5]In *Mansion House Center*, the Eighth Circuit concluded that charges of racial discrimination required a hearing when raised by employers in the circumstances presented here.

Center. For this reason, we believe that granting certiorari to resolve the conflict between the Eighth Circuit and the D.C. Circuit is unnecessary at the present time. If, after the Eighth Circuit has had occasion to consider the Board's rationale in *Handy Andy*, that court agrees with the D.C. Circuit that the *Handy Andy* rationale is sustainable, further review by this Court will not be required.

2. In the case of *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974), the Board adopted a rule substantially similar to that of the Eighth Circuit in *Mansion House Center*. In *Bekins*, the Board concluded that certification of a labor organization shown to be engaged in a pattern or practice of invidious discrimination would be tantamount to governmental approval of such conduct. *Id.* at 139. For that reason, the Board concluded that a pre-certification inquiry into the union's willingness to represent employees on a fair and equal basis was required by the Fifth Amendment. Significantly, however, the Board stated that its views on this question were in a state of flux and it declined to announce final substantive or procedural rules: "[a]fter much deliberation, we have concluded that we are not yet sufficiently experienced in this newly developing area of the law to enable us to codify, at this time, our approach to such issues, either procedurally or substantively." *Id.* at 141.[6]

Continued study of the problem raised in the *Bekins* case led the Board to overrule that decision in *Handy Andy, Inc., supra*. In *Handy Andy*, the Board

[6]The Board also pointed out the possibility that in some cases "correction of such statutory violations [may] best [be] left to the expertise of other agencies or to remedial orders less draconian than the total withholding of representative status." *Id.* at 140.

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concluded that "the policies of the Act are better effectuated by considering allegations that a labor organization practices invidious discrimination in appropriate unfair labor practice rather than representation proceedings." 228 N.L.R.B. at 448. The Board acknowledged its obligation to eliminate discriminatory practices, but noted that, as a general matter, unfair labor practice proceedings are better adapted to adjudicate charges of discrimination than hearings at the certification stage. The Board also emphasized the increased procedural safeguards available in unfair labor practice proceedings: "issues involving alleged invidious discrimination by a labor organization should be considered in an adversary proceeding in which the accused union is accorded the full spectrum of due process, including particularly the right of judicial review." *Id.* at 454.

Although it overruled the *Bekins* case, the Board noted in *Handy Andy* that it "has considered, and will continue to consider, in representation proceedings the possible impact of clearly existing invidious discrimination within the unit at issue or of appeals to prejudice directed at employees in such unit in cases where an inquiry into these matters is necessary to protect the fairness of the election process." *Id.* at 454. In the present case, petitioner raised no charge of invidious conduct by the union within the collective bargaining unit.

In affirming the Board's order in the present case, the court of appeals correctly noted that the *Handy Andy* rationale effectively guarantees the rights of fair representation and self-determination in the bargaining unit (Pet. App. A19; footnotes omitted):

> In contrast to denial of certification before the union becomes exclusive bargaining representative, sanctions based on violations of the duty of fair representation are more likely to be effective in providing a remedy for victims of discrimination * * *. The duty of fair representation applies to all exclusive bargaining representatives, not simply to those who use the Board's electoral or remedial machinery. Complaints that the union has violated its duty of fair representation are more likely to be brought by the individuals who are the victims of discrimination. This appropriately focuses the Board's inquiry on the union's conduct in a particular bargaining unit, easing the Board's fact-finding activities. When the complaint is brought by a victim of discrimination, the Board can tailor its order to redress specific instances of discrimination, making the victims whole, and, at the same time, providing more protection for the employees' right of self-determination.

3. In reaching a different result in *Mansion House Center, supra,* the Eighth Circuit concluded that "constitutional limitations on the Board's process require recognition of a charge of racial discrimination as an appropriate ground of inquiry where a union's representative capacity is questioned" (473 F. 2d at 474). The basis of that holding was the court's belief that "[f]ederal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimatizes and perpetuates such invidious practices" (*id.* at 477). As the Board's analysis in *Handy Andy* demonstrates, however, the right of fair representation sought to be protected by the Eighth Circuit can be vindicated most effectively in an unfair labor practice proceeding. By certifying the elected representative and thereafter strictly enforcing the duty of fair representation, the Board does not legitimatize or perpetuate discrimination; to the contrary, it increases the likelihood that it

will be eliminated. In these circumstances, it is reasonable to anticipate that the Eighth Circuit may well defer to the balance struck by the Board in *Handy Andy*, a case decided several years after *Mansion House Center* was handed down. There is accordingly no need at this time for this Court to resolve the conflict between the decision below and the decision in *Mansion House Center*.[7]

[7] *NLRB* v. *Sumter Plywood Corp.*, 535 F. 2d 917 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977), does not conflict with the decision below, as the D.C. Circuit recognized (Pet. App. A20 n.40). *Sumter* concluded that, while the issue of fair representation might be appropriate "for the Board to consider in certification proceedings or as an affirmative defense in a refusal to bargain proceeding" (535 F. 2d at 930), the " 'drastic step' of refusing to certify a union should be taken only in response to a strong demonstration [that] the union has in fact engaged in a pattern of racially discriminatory practices, and is likely to continue such practices" (*id.* at 931). The court below refrained from deciding "whether the Board could constitutionally exclude evidence that establishes the union's intention to discriminate *in the future* in the unit for which the union seeks certification" (Pet. App. A20 n.40). See also note 4, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Handy Andy, Inc. and Mason M. New, Petitioner, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Drivers & Helpers Local Union No. 657.

Case 23-RD-324

February 25, 1977

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a petition for decertification filed on May 14, 1974, and a Stipulation for Certification Upon Consent Election approved May 28, 1974, by the Regional Director for Region 23 of the National Labor Relations Board, an election by secret ballot was conducted on June 14, 1974, under the direction and supervision of the said Regional Director, among the employees in the appropriate bargaining unit set forth in the stipulation. At the conclusion of the counting of the ballots, a tally of ballots was prepared and served on the parties which showed that, of approximately 198 eligible voters, 175 cast ballots, of which 108 were cast for, and 66 against, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Drivers & Helpers Local Union No. 657, herein called the Union. There was one challenged ballot, an insufficient number to affect the results. Thereafter, the Employer filed a timely objection to the issuance of certification of the Union as bargaining representative.

In accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation and, on August 19, 1974, issued and duly served on the

parties his Report and Recommendation on Objection, in which he recommended that the Employer's objection be overruled and that the Union be certified as the exclusive bargaining representative of the employees in the unit involved herein. Thereafter, the Employer filed timely exceptions to the Regional Director's Report.

On December 29, 1975, the Board, having determined that this and a number of other cases involving alleged race and sex discrimination on the part of labor organizations presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument in this and other cases[1] limited to all issues arising from *N.L.R.B.* v. *Mansion House Center Management Corporation,* 473 F. 2d 471 (C.A. 8, 1973), and *Bekins Moving & Storage Co. of Florida, Inc.,* 211 NLRB 138 (1974), Members Fanning and Penello dissenting. Oral arguments were heard on February 2, 1976. *Amici curiae* arguments were also heard at that time.[2]

Upon the entire record in this case, including the exceptions and oral arguments, the General Counsel's statements of position, and the *amici* briefs, the Board finds:

1. The Employer is engaged in commerce within the meaning of Section 2(2) of the Act and it will

[1] *Trumbull Asphalt Company, Inc.*, Case 25-RC-5719; *Bell & Howell Company,* Case 13-CA-13680; and *Murcel Manufacturing Corporation,* Cases 10-CA-10122, 10-CA-10152, and 10-RC-9502.

[2] The American Federation of Labor and Congress of Industrial Organizations and the Chamber of Commerce of the United States submitted briefs and presented oral argument as *amici curiae.*

effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties agree, and we find, that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All warehouse employees, dock workers, truck drivers, sanitation drivers and helpers, shipping and receiving clerks, warehouse clerical employees, garage mechanics, fork lift and pallet jack maintenance employees and custodial employees employed at the Employer's grocery warehouse, produce warehouse, Harry Tappan Institutional Warehouse and meat products warehouse located in Bexar County, Texas, excluding all other employees including all maintenance and construction shop employees, poultry processing plant employees, bakery employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

5. The Employer's sole objection to the issuance of a certification to the Union is that

> [t]he Union . . . practices invidious discrimination by engaging in practices such as excluding persons from membership on the basis of race, alienage or national origin and/or is shown to have a propensity to fail to represent employees fairly.

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The Employer contends that the Union's alleged discriminatory practices preclude it from being certified as an exclusive bargaining representative, citing *Bekins Moving & Storage Co. of Florida, Inc., supra.* As evidence in support of its objection, the Employer relies primarily upon several decisions by the United States Court of Appeals for the Fifth Circuit.[3] In these cases, the court held, *inter alia,* that certain seniority provisions of the National Master Freight Agreement, to which the Union is a party together with various employers (but not the Employer herein), were unlawful because they perpetuated the effects of the employers' past discrimination. Consequently, the court found that the Union, by being party to such an agreement, had violated Title VII of the Civil Rights Act of 1964.[4]

The Employer's reliance on *Bekins* is based on the majority's holding in that case that the Board is constitutionally required to consider issues raised by an objection grounded on alleged invidious discrimination prior to issuance of a Board certification of representative.[5] As the majority noted in *Bekins*, however, the

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[3] *Rodriquez, et al.* v. *East Texas Motor Freight, Southern Conference of Teamsters and Teamsters Local* 657, 505 F. 2d 40 (C.A. 5, 1974); *Herrera et al.* v. *Yellow Freight System, Inc.*, 505 F. 2d 66 (C.A. 5, 1974); *Resendis et al.* v. *Lee Way Motor Freight, Inc.*, 505 F. 2d 69 (C.A. 5, 1974).

[4] 42 U.S.C. §2000e to 2000e-17 (Supp. II, 1972), amending 42 U.S.C. §2000e to 2000e-15 (1964).

[5] Members Fanning and Penello dissented on grounds that withholding certification as exclusive representative from a union which has won a duly conducted Board election is neither required by the Constitution nor permitted by the provisions of the Act and that such action would undercut rather than

question of whether a labor organization's invidious discrimination constitutes objectionable conduct warranting withholding certification was a novel issue and one on which the Supreme Court has not ruled. We now conclude that the policies of the Act are better effectuated by considering allegations that a labor organization practices invidious discrimination in appropriate unfair labor practice rather than representation proceedings. Accordingly, for the reasons set forth hereafter, the *Bekins* decision is overruled.[6]

In our view neither the fifth amendment to the Constitution nor the National Labor Relations Act, as amended, requires the Board to resolve questions of alleged invidious discrimination by a labor organization before it may lawfully certify the union as the exclusive bargaining representative of employees in an appropriate unit. Indeed, it appears to us that the contrary is true; namely, that the Board is not authorized to withhold certification of a labor

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strengthen the Federal Government's efforts to eliminate the discriminatory practices in issue.

Member Kennedy in his concurring opinion agreed that issues involving alleged discrimination on the basis of race, alienage, or national origin are appropriately raised in a precertification inquiry, but expressed his view that, although the Board is constitutionally required to consider such issues prior to certifying a labor organization as an exclusive bargaining representative, there is no similar constitutional requirement concerning alleged discrimination on the basis of sex. Our discussion herein relates to all allegations of invidious discrimination, assuming, without deciding in this case, that the same considerations necessarily apply.

[6] Members Fanning and Penello join in overruling the *Bekins* decision for the same reasons that led them to dissent therefrom and for such additional considerations as are expressed in this decision.

organization duly selected by a majority of the unit employees. In so holding we are fully cognizant of our continuing obligation under the statute to police the conduct of certified unions as it relates to their duty of fair representation. Issues relating to whether a union engages in unlawful race, sex, or other invidious forms of discrimination have historically been considered by the Board in the context of unfair labor practice proceedings. Such a proceeding, for the reasons discussed below, continues to be the appropriate vehicle for resolving such issues and for devising the appropriate remedies for unlawful discrimination including revocation of certification. This route recognizes the substantive and procedural differences between representation and unfair labor practice proceedings and affords the charged party the full panoply of due process of law without at the same time denying or delaying the employees' right to the services of their designated bargaining agent.[7]

The majority in *Bekins* concluded that precertification consideration of alleged invidious discrimination by labor organizations is required by the fifth amendment to the Constitution because the Board may not lawfully bestow its certification upon a union which in fact discriminates on the basis of such considerations. The majority stated that, under the

[7]The question involved here has been analyzed and discussed at length with clarity and distinction by Mr. Richard Bader in his law review note, "The Impact of De Facto Discrimination by Unions on the Availability of NLRB Bargaining Orders," 47 Southern California Law Review 1353 (1974). Our discussion below includes many of his observations. Subsequent to the publication of the article and graduation from law school, Mr. Bader became and is now a member of the staff of the National Labor Relations Board.

principle enunciated by the Supreme Court in *Shelley* v. *Kraemer*[8] and subsequent cases,[9] were the Board, as a Federal agency, to confer the benefits of certification on a labor organization which practices unlawful discrimination "the power of the Federal Government would surely appear to be sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment."[10]

The foregoing statement misconstrues the "state action" doctrine[11] as defined in *Shelley* v. *Kraemer*, *supra*, and its progeny. In *Shelley*, petitioners were blacks seeking to buy property covered by private restrictive covenants which prohibited occupancy of the covered premises by persons "not of the Caucasian race." The state courts had enforced the covenants and, consequently, had found that petitioner could not obtain valid title. The Supreme Court held that the agreement, standing alone, did not violate any constitutional right of petitioners, emphasizing that:

> [T]he principle has become firmly embedded in our constitutional law that the action inhibited by the [equal protection clause] of the Fourteenth

[8]334 U.S. 1 (1948).

[9]See, e.g., *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans* v. *Newton*, 382 U.S. 296 (1966); *Evans* v. *Abney*, 396 U.S. 435 (1970).

[10]211 NLRB at 139.

[11]Although the equal protection clause does not by its terms apply to the Federal government, it is well settled that the due process clause of the fifth amendment imposes the same restrictions on Federal action that the fourteenth amendment imposes on state action. *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

> Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. [Footnote omitted.][12]

The Court concluded, however, that enforcement of the covenants by state courts was state action subject to the equal protection clause. In so concluding, the Court commented:

> It is clear that but for the *active intervention* of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.
>
> These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are *cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights* in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. [Emphasis supplied.][13]

Thus, the prohibited state action in *Shelley* v. *Kraemer* was the *affirmative enforcement* by the State of a private agreement to discriminate.

Similarly, in *Peterson et al.* v. *City of Greenville,*[14] 10 blacks were arrested for trespassing after refusing to

[12]334 U.S. at 13.

[13]334 U.S. at 19.

[14]373 U.S. at 244 (1963).

leave a segregated lunch counter. In reversing their convictions, the Supreme Court noted that a local ordinance requiring segregation at lunch counters had removed the decision to segregate from the sphere of private choice,[15] and thus sufficiently involved the State in the counter manager's discrimination to violate the equal protection clause.[16] Thus, the case stands for the principle that a governmental body which *requires* a private party to discriminate runs afoul of the fifth or fourteenth amendments.

The governmental action doctrine, as applied to statutes and regulations, was further expanded in *Reitman* v. *Mulkey*[17] to extend to mere "authorization" of private discrimination. In that case, an amendment to the California state constitution, which prohibited any governmental agency within the State from abridging the absolute discretion of any property owner to sell or lease, or to refuse to sell or lease, his property to anyone for any reason, was declared unconstitutional.[18] Although purporting to remain neutral on the question of private racial discrimination in housing, the amendment repealed two open housing statutes, and erected a barrier to attaining any such legislation in the future. The Court held that, taken in the context of the conditions and attitudes of its passage, the amendment "was intended to authorize, and does authorize, racial discrimination in the housing

[15]373 U.S. at 248.

[16]373 U.S. at 248.

[17]387 U.S. 369 (1967).

[18]The Court "accepted" the ruling of the California Supreme Court, which had so held. 387 U.S. at 381.

market."[19] Thus, the prohibited state action in *Reitman* was *authorization* by the State of private discrimination.

Finally, in *Moose Lodge No. 107* v. *Irvis*,[20] a state liquor control agency, in granting liquor licenses, promulgated numerous regulations with which licensees had to comply. One of these required that "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-laws."[21] Moose Lodge had a provision in its constitution which denied membership to blacks. The trial court had relied on the pervasive regulation of the club's activity by the liquor control board in ruling that the agency was sufficiently implicated with the discriminating club to violate the fourteenth amendment. But the Court, in analyzing the amount of government involvement necessary to raise constitutional issues, rejected the trial court's reasoning, noting that "[h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way *foster* or *encourage* racial discrimination."[22] (Emphasis supplied.) The Court held that only one regulation which had the effect of specifically requiring the club to discriminate was sufficiently involved with the private club's racially discriminatory policy to run afoul of the Constitution. None of the other regulations governing the operation of Moose Lodge were so entwined with the racial policies as to trigger the equal protection clause, because they did not

[19]387 U.S. at 381.

[20]407 U.S. 163 (1972).

[21]407 U.S. at 177.

[22]407 U.S. at 176-177.

specifically support the racial discrimination.[23] This distinction, which is of obvious importance, was stated by the Court as follows:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever . . . . [S]uch a holding would utterly emasculate the distinction between private as distinguished from state conduct . . . . Our holdings indicate that where the impetus for the discrimination is private, the state must have "*significantly involved* itself with invidious discriminations" [citation omitted] in order for the discriminatory action to fall within the ambit of the constitutional prohibition. [Emphasis supplied.][24]

Thus, to summarize, while "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task,' "[25] it is clear that governmental bodies cannot be "significantly involved" in discrimination. Such involvement has been found in the past where government "required" private parties to discriminate, "enforced" private discrimination, "authorized" private discrimination, or "fostered and encouraged" discrimination. Thus, the issue is whether a sufficiently close nexus is established between governmental action and actual discrimination by a private party; mere involvement

[23]407 U.S. at 177.

[24]407 U.S. at 173.

[25]*Burton* v. *Wilmington Parking Authority*, *supra*, 365 U.S. at 722.

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with a private party who discriminates is not enough. For the reasons set forth below, we conclude that there is no such nexus between the Board's certification and any discrimination undertaken by a union which has received such a certification.

We recognize, of course, that certification of a labor organization confers substantial benefits. The Board does not, however, by certifying a labor organization, place its imprimatur on all the organization's activity, lawful or otherwise. On the contrary, a certification is neither more nor less than an acknowledgement that a majority of the employees in an appropriate bargaining unit have selected the union as their exclusive bargaining representative.[26] The choice of representative is made by the employees, and may not be exercised by this Board:

> For, it must be remembered that, initially, the Board merely provides the machinery whereby the desires of the employees may be ascertained, and

[26]Of course, certification is based on recognition that the representative qualifies as a labor organization within the meaning of Sec. 2(5) of the Act. In this regard, we agree with the dissenters in *Bekins* that the majority in that case reached the anomalous result that a union may be a "labor organization" entitled to a place on the ballot and then, after the election, be "disqualified" from receiving certification on grounds that it practices invidious discrimination. This anomaly may have unfortunate consequences if the union wins the election, for, if a "disqualified" union is not a "labor organization" then the prohibitions of Sec. 8(b) do not apply to it. If the winning but "disqualified" union is a "labor organization," however, then the election is a valid one and, consequently, the employees will not only have been denied the right to be represented by their chosen bargaining agent but will also be denied the opportunity to vote for any representative for another year. 211 NLRB at 147-48, fn. 43.

> the employees may select a "good" labor organization, a "bad" labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative.[27]

Clearly, certification does not constitute enforcement or even approval of a labor organization's activities, and should not be construed as "state action" restricted by the fifth amendment.

Indeed, a union's status as the bargaining representative gives it no right or authority to establish *hiring* restrictions based on membership restrictions whether or not such membership restrictions are legitimate for other purposes. For, under the Act, it is an unfair labor practice for a labor organization, whether or not it is certified, to cause or attempt to cause employers to hire on the basis of membership or nonmembership in a union. The Act further provides appropriate means to remedy such an unfair labor practice. Furthermore, a bargaining representative's right to enter into union-security agreements with employers conditioning continued employment on union membership or payment of agency shop fees is dependent on the availability of membership in the bargaining representative to any employees who choose to join. Similarly, if access to a union hiring hall is limited to union members, the exclusive hiring hall agreement violates the Act. Further, any membership policy of a union which would tend to limit job opportunities for minorities is barred by Title VII of the Civil Rights Act of 1964, as amended. Finally, the duty of fair representation[28] prevents unions from using

[27]*Alto Plastics Manufacturing Corporation*, 136 NLRB 850, 851 (1962).

[28]See discussion concerning the duty of fair representation, *infra*.

their bargaining representative powers in a discriminatory manner. Thus, while use of Board processes and the Board's certification may have helped a union gain the power of bargaining representative established by the Act, the union has not been authorized to discriminate in the exercise of those powers. The Act and the Board's implementation of it can hardly be said to be "significantly involved" in the union's discrimination, since the duty of fair representation in its various forms *specifically prohibits* a union from practicing unlawful discrimination under the authority of the Act. Therefore, the Board, while it may extend the Act's protection to the union, is not involved in the union's discriminatory activities, a requirement of the governmental action doctrine.

This view is buttressed by the indisputable fact that the Act predicates a union's bargaining representative status on its being chosen by a majority of the employees in the bargaining unit, not by the Board. Recognition of that status by the Board, through certification and/or a bargaining order, merely means that the Board is satisfied that a majority of the workers in the unit have chosen this union as their bargaining representative and that therefore the employer is statutorily required to bargain with it. The Board is substantially analogous in this respect to the Pennsylvania Liquor Control Board in the *Moose Lodge* case, about which the Court noted:

> Unlike the situation in *Public Utilities Comm.* v. *Pollak*, [citation omitted], where the regulatory agency had *affirmatively approved* the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the *racially discriminatory practices* of Moose Lodge.[29] [Emphasis supplied.]

Indeed, the courts have found that an exclusive bargaining representative is subject to the duty of fair representation which prevents that union from using its position to unlawfully discriminate. The Congress has also taken steps to eliminate such discrimination based on race, etc., by enacting Title VII of the Civil Rights Act of 1964, as amended. Title VII, as implemented by the Equal Employment Opportunity Commission, performs the very function—using the same test for discrimination—which the Eighth Circuit Court of Appeals in *N.L.R.B.* v. *Mansion House Center Management Corporation*[30] would require of the Board.[31] The *Mansion House* court was thus not requiring the Government merely to meet constitutional requirements, but to meet them in a particular way which the court preferred to the method Congress has chosen. This view is supported by the Supreme Court's recent decision in *Washington, Mayor of Washington, D.C.* v. *Davis*,[32] in which the Court held that the standard for determining whether governmental action constitutes discrimination proscribed by the Constitution is not the same as the test to be utilized under Title VII.

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[29] *Moose Lodge, supra,* 407 U.S. at 175 fn. 3.

[30] 473 F. 2d 471 (C.A. 8, 1973). In that case, the court held that the remedial machinery of the Act could not be made available to a labor organization which engaged in unlawful racial discrimination.

[31] In fact, in supporting its test for racial discrimination in *Mansion House*, the court cited almost exclusively Title VII cases.

[32] 426 U.S. 229 (1976).

A logical consequence of the *Bekins* constitutional determination is the conclusion that in their respective areas of authority the Federal agencies have overlapping responsibility for remedying any invidious discrimination by private parties.[33] For example, one might argue that the Interstate Commerce Commission may not constitutionally approve a route of a common carrier which engages in discriminatory hiring practices or that the Securities and Exchange Commission is prohibited from approving a prospectus of a corporation which engages in such practices. This argument was recently rejected by the Supreme Court in *National Association for the Advancement of Colored People* v. *Federal Power Commission,*[34] in which the Court held that the FPC does not have the authority to promulgate rules prohibiting its regulatees from engaging in discriminatory employment practices, but that the Commission does have authority to consider the consequences of employment discrimination in performing its mandated regulatory functions. In that case, the Court discussed extensively the petitioner's argument that the references to the "public interest" in the Gas and Power Acts[35] authorized "if indeed it did

[33]The *Bekins* conclusion further implies that Congress does not have the power to vest jurisdiction over claims of racial or other invidious discrimination exclusively in a single agency, the Equal Employment Opportunity Commission. This conclusion is clearly wholly untenable. See 42 U. Chi. L. Rev. 1, 10 (1974).

[34]425 U.S. 662 (1976).

[35]See e.g., 16 U.S.C. §824(a): "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." Similarly, Sec. 1(b) of the National Labor Relations Act, as amended, refers to the policy of the Act to "define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare."

not require" the FPC to promulgate such rules. Rejecting this argument, the Court emphasized that it was necessary to look to the purposes of the Gas and Power Acts and:

> . . . that the principal purpose of those Acts was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices. While there are undoubtedly other subsidiary purposes contained in these Acts, the parties point to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation. The use of the words "public interest" in the Gas and Power Act is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates. [Footnotes omitted.][36]

Mr. Chief Justice Burger, in a concurring opinion, further stated:

> If Congress had mandated duplicative regulation, the result, however inefficient, would be none of our concern. But Congress did not do so. It centralized responsibility in the Equal Employment Opportunity Commission. To the extent that the *judiciary* orders administrative responsibility to be diffused, congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even

[36]425 U.S. at 669-670.

more slowly. To suggest, for example, that the FPC could deny a license on account of a regulatee's discriminatory employment practices . . . is to thrust the Commission into a complex, volatile area for which Congress has already assigned authority to the EEOC. [Emphasis in original.][37]

Furthermore, as Professor Meltzer of the University of Chicago has noted,[38] "An administrative agency generally does not have jurisdiction to invalidate important elements of its enabling legislation." In *Johnson, Administrator of Veterans' Affairs* v. *Robinson,*[39] Mr. Justice Brennan, speaking for the majority of the Court, quoted with approval Mr. Justice Harlan's concurring opinion in *Oestereich* v. *Selective Service System Local Board No. 11, Cheyenne, Wyoming,*[40] for the proposition that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."[41] In our view, the *Bekins* majority ignored this principle. For, by concluding that "[t]o construe the mandatory language of the statute without reference to . . . constitutional issues would cause the statute itself to fall afoul of . . . constitutional limitations,"[42] the majority members in

[37]425 U.S., at 673-674.

[38]"The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?" 42 U. Chi. L. Rev. 1, 20, fn. 93 (1974).

[39]415 U.S. 361 (1974).

[40]393 U.S. 233, 242 (1968).

[41]415 U.S. at 368.

[42]211 NLRB at 139.

effect arrogated to this Board the power to determine the constitutionality of mandatory language in the Act we administer, a power that the Supreme Court has indicated we do not have. This view is further reinforced by the Supreme Court's recent decision in *Hudgens* v. *N.L.R.B.*[43] A majority of the Court there held that certain consumer picketing by a labor organization was not protected by the first amendment and that, therefore, the Act was the sole standard to be applied in determining whether or not the activity was protected. In this regard, the Court noted the following with respect to the Board's authority:

> Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, "and to seek a proper accomodation between the two." *Central Hardware Co.* v. *N.L.R.B.*, 407 U.S. 539, 543. What is "a proper accommodation" in any situation may largely depend upon the content and the context of the § 7 rights being asserted. The task of the Board and the reviewing courts under the Act, therefore, stands in conspicuous contrast to the duty of a court in applying the standards of the First Amendment, which requires "above all else" that expression must not be restricted by government "because of its message, its ideas, its subject matter, or its content."[44]

Issuance of a certification to a union which has won a fairly conducted valid election is mandated by the Act. As the dissenters in *Bekins* emphasized:

> Congress in Section 9(c)(1) directed that "[w]henever a petition has been filed in accordance

[43]424 U.S. 507 (1976).

[44]424 U.S. at 521.

with such regulations as may be prescribed by the Board . . . the Board *shall* investigate such petition and if it has reasonable cause to believe that a question concerning representation affecting commerce exists *shall* provide for an appropriate hearing. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and *shall* certify the results thereof." (Emphasis supplied.) This language is language of requirement. Absent unfairness in the election itself, the section commands the Board to issue a certification of representative to the winning labor organization. [Footnotes omitted.][45]

We conclude that the *Bekins* doctrine will significantly impair the national labor policy of facilitating collective bargaining, the enforcement of which is our primary function. First, the workers in the unit will be denied the "right guaranteed them by Section 7 of the Act to bargain collectively through representatives of their own choosing,"[46] which could be the only effective bargaining representative available to them.

Indeed, even a union which practices some unlawful discrimination may be the best one available in the opinion of the workers in the unit, who are given the right to decide for themselves by the Act. Even if minority members of the unit are convinced that the union will fairly represent them, and vote for the union under the *Bekins* approach, a bargaining order

[45]211 NLRB at 147.

[46]See *Bekins*, 211 NLRB at 148, dissenting opinion.

may still have to be denied.[47] Yet, the minority workers might not be helped by keeping the union out, since they will then be at the mercy of their employer who has no duty of fair representation to fulfill, who may act to the detriment of *all* the workers, and who may also discriminate against minorities. In short, a union that has discriminated actively in the past and still has a racial imbalance may be preferable for minority workers to no union at all. Second, employers faced with the prospect of unionization will be provided and have been provided under the Board's *Bekins* doctrine with an incentive to inject charges of union racial discrimination into Board certification and bargaining order proceedings as a delaying tactic in order to avoid collective bargaining altogether rather than to attack racial discrimination.

Not only does the *Bekins* approach impair the national labor policy favoring collective bargaining, but it is ineffective in implementing an antidiscrimination policy. Denying certification and bargaining orders to discriminating unions may seem to be an effective sanction as the status of bargaining representative is the source of a union's power. However, many unions have no need of Board aid to gain or keep the position of bargaining representative. Most unions do not resort to certification elections to establish their majority status, and many unions which are certified would not be harmed by losing their certifications. Entrenched unions, which already have well-established bargaining relationships with employers, need no aid

[47]In *Mansion House*, the one black member of the bargaining unit signed an authorization card. The Board thought this was significant, but the court ignored this fact. 473 F. 2d at 475.

from the Board in maintaining their positions. Powerful unions, which can make effective use of such traditional self-help remedies as striking and picketing to force employers to bargain, have no need for bargaining orders. These powerful and entrenched unions are the ones with the least natural incentive to lower racial barriers, because they do not have to worry about attracting votes at representation elections as the weaker unions must. Thus, the *Bekins* remedies fail to reach those unions likely to be the worst offenders. In addition, *Bekins*, by increasing the duration of representation cases, would create problems in applying Section 8(b)(7)(C) to picketing by unions whose representational eligibility is being litigated or has been denied by the Board. To prevent a union found ineligible for certification from engaging in representative status unavailable through the Board's usual representation case processes, and to prevent the prospect of a series of election petitions followed by recognitional picketing, the Board would be under pressure to disregard the literal language of Section 8(b)(7)(C) by making any recognitional picketing by an ineligible union a violation of that section.[48]

Also, under the majority *Bekins* holding, a labor organization could be denied certification upon the mere presumption that it will fail to discharge its responsibility to represent employees in *this* unit fairly solely because it has failed to represent employees fairly in some *other* bargaining unit, rather than on proof of such dereliction as to unit employees in a revocation proceeding. In fact, the Employer herein, in seeking to prevent the issuance of certification, relies upon discriminatory provisions in the Union's contracts

[48] *Bekins*, 211 NLRB at 147. fn. 43, dissenting opinion.

in other bargaining units with other employers, contracts to which this Employer has never been a party and which were found to be unlawful solely because they perpetuated the other employers' past discrimination. For the Board to conclude that there will be further unlawful conduct solely on the basis of such evidence is directly contrary to our longstanding policy. Traditionally, as is true of virtually all court and administrative determinations, the Board's findings and remedies apply only to the particular parties before us.

The *Bekins* holding further would lead to anomalous situations such as that where an employer exercises exclusive control over hiring, resulting in the total absence of female and black employees in the unit, yet it is argued that this situation constitutes evidence of the union's propensity to practice discrimination and certification of the union would perpetuate this condition. In these circumstances it would be ludicrous to excuse the employer from its bargaining obligation.

In the instant case, the Employer concedes that, in a bargaining unit comprised of 211 employees, 58 are black and 114 are Spanish-surnamed Americans. Inasmuch as the Union won the decertification election by a vote of 108 to 66, simple arithmetic establishes that a substantial percentage of the minority employees voted in favor of continued representation by the Union. This Union has represented these employees and, presumably, these employees would not have selected it again as their collective-bargaining agent had the Union previously discriminated against them or had they considered it likely that the Union would do so in the future.

Thus, the argument raised by the Employer here runs counter to our basic policy discussed above of

looking only at the conduct of the parties to our proceeding *vis-a-vis* each other.[49] Indeed, it appears that the Employer's purpose is to delay the onset of bargaining rather than to protect the minority or female employees from actual discrimination by the bargaining representative.

Questions concerning representation must be expeditiously resolved in order to achieve the statutory objective of fostering collective bargaining and assuring stability in labor-management relations. To that end, Congress chose to deny the parties judicial review of representation proceedings and to exempt such proceedings from the strictures of the Administrative Procedure Act.[50] For the same reason, representation questions are decided in nonadversary, factfinding proceedings. The overriding importance of allowing employees to decide as expeditiously as possible whether or not they desire a bargaining representative justifies elimination of these procedural safeguards in representation cases.

This is not to say that the Board will never consider such issues in representation proceedings. Rather, we have and will continue to consider the impact of unlawful discrimination where such consideration is required to preserve the integrity of the Board's own processes. Thus, the Board has long held that it would not apply its contract-bar rules so as to shield

[49]Even in cases where the Board has held, prior to an election, that a union was disqualified from representing employees, such finding has been predicated on the labor organization's conflict of interest with employees in the *specific* unit sought. *Harlem River Consumers Cooperative, Inc.*, 191 NLRB 314 (1971); *Bambury Fashions, Inc.*, 179 NLRB 447 (1969).

[50]*American Federation of Labor, et al.* v. *N.L.R.B.*, 308 U.S. 401, 409-411 (1940).

collective bargaining agreements which patently discriminate between black and white employees from the challenge of otherwise appropriate election petitions.[51] In reaching this conclusion, the Board specifically recognized that to hold otherwise would be inconsistent with the Supreme Court's condemnation of governmental sanctioning of racially separate grouping.[52] Similarly, in order to insure fairness in Board-conducted elections, the Board has held that an employer's preelection propaganda which constituted "a deliberate, sustained appeal to racial prejudice . . . created conditions which made impossible a reasoned choice of a bargaining representative." [53] The decision emphasized that "[t]he Board does not intend to tolerate as 'electoral proganda' appeals or arguments which can

[51]*Pioneer Bus Company, Inc.*, 140 NLRB 54 (1962).

[52]*Brown, et al.* v. *Board of Education of Topeka, et al.*, 349 U.S. 294 (1954); *Burton* v. *Wilmington Parking Authority, et al.*, 365 U.S. 715 (1961). We emphasize that *Pioneer Bus, supra*, is not statutorily mandated. Our contract-bar rules are wholly discretionary and, consequently, we need not recognize an existing collective bargaining agreement as a bar to an election where to do so would not contribute to the stability of labor relations but would have the reverse effect. See *The Pulitzer Publishing Company (Owner and Operator of Stations KSD and KSD-TV)*, 203 NLRB 639 (1973).

[53]*Sewell Manufacturing Company*, 138 NLRB 66, 70 (1962).

have no purpose except to inflame the racial feelings of voters in the election."[54]

It is thus apparent that the Board has considered, and will continue to consider, in representation proceedings the possible impact of clearly existing invidious discrimination within the unit at issue or of appeals to prejudice directed at employees in such unit in cases where an inquiry into these matters is necessary to protect the fairness of the election process.[55] However, because of the essentially non-adversary nature of representation proceedings, we believe that allegations of invidious discrimination should be considered in such proceedings *only* when required to fulfill our primary obligation of protecting employees from interference in exercising their right to select a bargaining representative.

It is thus apparent that issues involving alleged invidious discrimination by a labor organization should be considered in an adversary proceeding in which the accused union is accorded the full spectrum

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[54]138 NLRB at 71. See also *Glazers Wholesale Drug Company, Inc.*, 209 NLRB 1152 (1974), in which a majority of a Board panel concluded that an employer's comment that if the union was voted in "the blacks would take over" could be grounds for setting an election aside, although it was not a threat of employer action constituting a violation of Sec. 8(a)(1) of the Act. Also cf. *NLRB* v. *Staub Cleaners, Inc.*, 357 F. 2d 1 (C.A. 2, 1966) remanding 148 NLRB 278 (1964), Supplemental Decision and Order 171 NLRB 332 (1968), enf'd 418 F. 2d 1086 (C.A. 2, 1969).

[55]In these cases, however, the Board was not required to resolve factual disputes. Rather, each instance involved evaluation of uncontroverted facts as to possible impact on the election process.

of due process, including particularly the right of judicial review.[56]

This view accords with the basic premise of the Act that a determination that a party has engaged in unlawful conduct under Section 8 may only be made in an adversary proceeding initiated by a charge and followed by an investigation, issuance of a formal complaint, and litigation in a hearing before a duly qualified Administrative Law Judge. Such proceedings are at all stages subject to the Administrative Procedure Act and to review by Federal courts of appeals.[57] These procedures also accord with the basic

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[56]We agree with our concurring colleague that all fair representation claims must be adjudicated under Sec. 8(b) of the Act and not as a defense to an 8(a)(5) proceeding or in a representation proceeding.

[57]Our dissenting colleague disputes our view that under the *Bekins* approach a union which has been refused certification has very little opportunity to obtain judicial review of such action. He cites *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch*, 322 F. 2d 993 (C.A. D.C., 1963), for the proposition that such review is available for cases in which "the Board acts 'in excess of its delegated powers and contrary to a specific prohibition in the Act,' and when such action causes the 'depri[vation] . . . of a "right" assured . . . by Congress.' " 322 F. 2d at 994. Assuming that such review is available whenever application of the *Bekins* doctrine requires the withholding of a certification, it would be available only if, as we believe, that doctrine caused the Board to act "in excess of its delegated powers and contrary to a specific prohibition in the Act." Such review would not be available as to the factual finding that the union engaged in the disqualifying discrimination. Quite naturally, given our disagreement with our colleague as to the merits of the *Bekins* doctrine, we do not see how the availability of such limited review can be counted as an argument in favor of *Bekins*. Rather, we believe his observation and the case he cited in support helps to show the essential correctness of our views in the matter.

procedures required under Title VII, i.e., filing of a charge followed by investigation and, where required, a full court hearing on the merits.

Indeed, as Professor Meltzer observed with respect to the *Bekins* doctrine:

> In addition, the dissenters' approach would avoid the suspension of important rights on the basis of allegations, and thereby would serve the values of the NLRA, Title VII and our legal system generally. Indeed, it is one of the several ironies of *Bekins* that the Board will suspend an important right on the basis of allegations of Title VII violations, while a party charged under that title suffers no legal disability until there is a judicial finding upholding the charge.[58]

We conclude that our statutory function of eliminating invidious discrimination by labor organizations is best served by scrutinizing their activities when they are subject to our adversary procedures and remedial orders. Indeed, the Board has long utilized unfair labor practice procedures to consider allegations of invidious discrimination by labor organizations and employers which interfere with Section 7 rights. We have done so with respect to unions by policing their conduct *vis-a-vis* the employees in units they represent through our power to remedy a labor organization's breach of its duty of fair representation. This doctrine was first enunciated by the Board in *Miranda Fuel Company, Inc.*:[59]

[58]See *Meltzer, supra* at p. 24.

[59]140 NLRB 181 (1962).

> Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair. [Footnote omitted.][60]

This doctrine of the duty of fair representation was derived from the Supreme Court's decision in three companion cases: *Steele* v. *Louisville & Nashville Railroad Co.*;[61] *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen;*[62] and *Wallace Corporation* v. *N.L.R.B.*[63] In *Steele* and *Tunstall,* both of which involved racial discrimination by a union which was statutory representative under the Railway Labor Act, the Court concluded that such a representative "cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft."[64] In

[60]140 NLRB at 185.

[61]323 U.S. 192 (1944).

[62]323 U.S. 210 (1944).

[63]323 U.S. 248 (1944).

[64]323 U.S. at 204. Our dissenting colleague states that "[i]n *Steele* v. *Louisville & Nashville Railroad Co.* . . . the Supreme Court made clear that the Constitution prohibited a labor organization, which was granted a statutory right to bargain exclusively for employees, from engaging in invidious discrimination in their representation." What the Supreme Court held in that case was that the Railway Labor Act imposed such a duty upon the statutory representative (at 202). Of course Justice Murphy, in his concurrence, expressed the view that such a duty was constitutionally mandated (at 209).

Wallace, which did not involve race discrimination, the Court held that the same duty of fair representation was required of bargaining representatives selected under the National Labor Relations Act.

The duty of fair representation has become the touchstone of the Board's concern with invidious discrimination by unions. For example, it is well established that a labor organization's rejection of an employee's grievance solely because of his or her race breaches the duty of fair representation and violates Section 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act.[65] Similarly, we have held that a union's refusal to process grievances filed to protest an employer's segregated plant facilities constitutes a violation of Section 8(b)(1)(A).[66]

In *Galveston Maritime Association, Inc.*,[67] the Board held, again relying on the duty of fair representation, that a union's maintenance of a collective-bargaining agreement which allocated work on the basis of race violated Section 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act. The Board premised the 8(b)(2) violation on its conclusion that the establishment, maintenance, and

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[65] *Independent Metal Workers Union, Local No. 1 (Hughes Tool Company)*, 147 NLRB 1573 (1964).

[66] *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America* AFL-CIO (*The Business League of Gadsden*), 150 NLRB 312 (1964), enf'd 368 F. 2d 12 (CA 5, 1966). The Board specifically noted that the union's refusal to process the grievances was based on its belief that discriminatory job conditions should continue and therefore held that the refusal to process a grievance on that ground violated the duty of fair representation.

[67] *Local 1397, International Longshoremen's Association*, AFL-CIO, *et al. (Galveston Maritime Association, Inc.)*, 148 NLRB 897 (1964), Member Fanning concurring.

enforcement of discriminatory work quotas based on irrelevant, invidious, and unfair considerations of race and union membership discriminated against employees in violation of Section 8(a)(3) of the Act and that, by causing an employer to so discriminate, a union violates Section 8(b)(2). In holding that the work allocation violated Section 8(b)(3), the Board concluded that "a labor organization's duty to bargain collectively includes the duty to represent fairly,"[68] on grounds that collective-bargaining agreements which discriminate invidiously are not lawful under the Act and therefore do not meet the good-faith requirements of Section 8(d).

The duty of fair representation is not limited to present discrimination, but is also breached by union policies which perpetuate past discrimination. Thus, in *Houston Maritime Association*,[69] the union had a policy prior to September 1963 of refusing to accept black applicants for membership. In the latter part of that month, the union adopted a policy of closing its register of applicants and refusing to accept any further applications regardless of the applicant's race. In addition to finding that the union's new policy violated Section 8(b)(1)(A) and Section 8(b)(2) of the Act as an attempt to perpetuate past discrimination, the Board found that the employers who had participated in the pattern of unlawful conduct had thereby violated Section 8(a)(1) and (3).

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[68] 148 NLRB at 899.

[69] *Houston Maritime Association, Inc. and Its Member Companies*, 168 NLRB 615 (1967).

While these cases clearly illustrate that we provide a remedy for breach of the duty of fair representation, thereby protecting employees from invidious discrimination by their bargaining representative, other remedies for a union's unlawful discrimination are also available. For example, we have held that a union commits unfair labor practices by attempting to force an employer to continue discriminatory practices even though no breach of the duty of fair representation is involved.[70] Additionally, the Board has, in appropriate cases, revoked the certification of unions which engage in unlawful invidious discrimination.[71]

As the foregoing discussion indicates, the Board has long recognized its obligation to consider issues concerning discrimination on the basis of race, sex, national origin, or other unlawful, invidious, or irrelevant reasons when they are raised in an appropriate context, and we shall continue to do so.[72]

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[70] *Local Union No. 2, of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Astrove Plumbing and Heating Corp.)*, 152 NLRB 1093 (1965), wherein the Board held that a union violated Sec. 8(b)(2) and 8(b)(1)(A) of the Act by engaging in a walkout in order to protest an employer's attempt to remedy its past discrimination.

[71] *Independent Metal Workers Union, Local No. 1 (Hughes Tool Company), supra.*

[72] Member Fanning notes the dissent's observation in fn. 76 that "Member Fanning has not yet accepted *Miranda.*" This is superficially correct. He does not, for the reasons explained in *General Truck Drivers, Chauffeurs and Helpers Union Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Great Western Unifreight System)*, 209 NLRB 446 (1974). But, as he carefully explained in his concurring opinion in that decison, that does not mean that he—any more than the Board majority—sanctions or condones union misconduct towards employees. He has found violations of

However, on the basis of all the foregoing, although we neither approve nor condone discriminatory practices on the part of unions, we hereby overrule *Bekins* as we conclude that the holding of that case is neither mandated by the Constitution nor by the Act and is destructive of the policies embodied in Section 9(c) of the Act. We further conclude that issues such as those raised by the Employer herein are best considered in the context of appropriate unfair labor practice proceedings. We do so on the basis of the paramount importance of avoidance of delay in representation cases, the procedural safeguards afforded in unfair labor practice proceedings which are not available in representation proceedings, the somewhat different purposes served by Section 8 and Section 9 of the Act, and the fact that effective procedures already exist for litigation of the type of discrimination alleged by the Employer herein.

We therefore overrule the Employer's objection and shall certify the Union as the representative of the employees in the unit found appropriate above.

Sec. 8(b)(1)(A) in the maintenance of segregated locals, *Local No. 106, Glass Bottle Blowers Association*, AFL-CIO (*Owens-Illinois, Inc.,)* 210 NLRB 943 (1974), enfd. 520 F. 2d 693 (CA 6, 1975); and of Sec. 8(b)(1)(A) and 8(b)(2) in a union's coercive advocation and enforcement of racially discriminatory hiring policies, *International Brotherhood of Painters and Allied Trades, Local Union 1066*, AFL-CIO (*W. J. Siebenoller, Jr., Paint Company)*, 205 NLRB 651 (1973). He has, moreover, found breaches of the duty of fair representation be be violations of Sec. 8(b)(1)(A), *Truck Drivers, Oil Drivers and Filling Station and Platform Workers Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Transport, Inc.)*, 209 NLRB 292 (1974); *Local 485, International Union of Electrical, Radio & Machine Workers*, AFL-CIO (*Automotive Plating Corp.*), 170 NLRB 1234 (1968).

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Drivers & Helpers Local Union No. 657, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

> All warehouse employees, dock workers, truck drivers, sanitation drivers and helpers, shipping and receiving clerks, warehouse clerical employees, garage mechanics, fork lift and pallet jack maintenance employees and custodial employees employed at the Employer's grocery warehouse, produce warehouse, Harry Tappan Institutional Warehouse and meat products warehouse located in Bexar County, Texas, excluding all other employees including all maintenance and construction shop employees, poultry processing plant employees, bakery employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

MEMBER WALTHER, concurring:

I agree with my colleagues in the majority that the Employer's objection should be overruled. I agree also with their rationale for doing so to the extent that it is consistent with the views expressed below.

With respect to allegations pertaining to a union's breach of its duty of fair representation, not only do I

agree with my colleagues that such claims "should be" considered in an adversary proceeding, I think that they *must* be considered in such a proceeding. Assuming, as I do, that a proper accommodation between this Board and other governmental agencies (*e.g.*, EEOC) requires us to confine our examination to actual discrimination in the particular unit under consideration, fair representation claims are premature in both representation and 8(a)(5) certification-test proceedings—for in neither situation has the union yet been afforded an opportunity to represent the unit employees at all, fairly or unfairly. Such claims would, of necessity, have to relate to potential breaches of the duty of fair representation based upon conduct at other locations, an area of inquiry I would not entertain in any Board proceeding. For this reason, and for all of the due process safeguards attendant to our unfair labor practice proceedings mentioned by my colleagues, I conclude that all fair representation claims must be adjudicated under Section 8(b) of the Act.

My colleagues in the majority note that "we have and will continue to consider [in a representation proceeding] the impact of unlawful discrimination where such consideration is required to preserve the integrity of the Board's own processes." To the instances which they cite, I would add yet another: instances in which it can be established through reference to a petitioner's constitution, bylaws, or other written statement of policy, that the petitioner—not an affiliated organization or sister local—restricts access to membership on the basis of race, alienage, national origin, or sex. Should such discrimination be found, I would disqualify the petitioner from access to our

election machinery until it can establish that the offensive practices have been eliminated.

The proviso to Section 8(b)(1)(A), of course, prohibits litigation of membership discrimination claims in an unfair labor practice proceeding. I do not think, however, that the Board should ignore such blatant discrimination. Irrespective of whether we are constitutionally obligated to do so, I would, as a matter of discretion, deny a union which discriminates in this fashion access to our election machinery. In such instances, the discriminatory conduct is open, documented, and pervasive. The step which I recommend it seems to me is, in the words of the majority, "required to preserve the integrity of the Board's own processes."[73]

In the instant case, the Employer alleged discrimination both in the form of exclusionary membership policies and unfair representation. The evidence which was submitted, however, all related to matters falling within the realm of fair representation. No evidence was offered in support of the restrictive membership claim. In these circumstances, I agree with my colleagues that the Employer's objection should be overruled.

MEMBER JENKINS, dissenting:

On June 7, 1974, the Board in *Bekins Moving & Storage Co. of Florida, Inc.*, 211 NLRB 138 (1974), held that the due process clause of the fifth amendment precludes its certification as the exclusive

[73]Since the inquiry would determine the union's qualification to use election procedures, appropriate membership discrimination claims would have to be entertained at the outset of the representation procedure, prior to the direction of an election.

representative of unit employees of a labor organization which engages in invidious discrimination and that a precertification inquiry as to a labor organization's representation of employees on a nondiscriminatory basis is constitutionally required if the issue is timely raised. Two members of the Board dissented from this decision for the reason, among others, that any constitutional obligation of fair representation could be enforced after certification and that to delay certification for an inquiry into the labor organization's capacity for nondiscriminatory representation would provide "a procedure by which employers opposed to dealing with their employees collectively can delay and forestall the establishment of the collective-bargaining relationship." 211 NLRB at 148.

Experience of more than 2-1/2 years with the *Bekins* decision has provided no evidence of the delays which the dissenting members envisaged and which constituted a principal basis for their dissent. In the intervening years, however, the membership of the Board has changed and today a new majority holds that the due process clause of the fifth amendment does not preclude the Board from certifying as the statutory bargaining agent created by the National Labor Relations Act a union which engages in discriminatory representation, that the statute requires the certification of such a union if it is successful in an election, and that for policy reasons, as well as the statutory mandate, charges of discriminatory representation "are best considered in the context of appropriate unfair labor practice proceedings." Accordingly, it overrules the *Bekins* decision and forecloses any precertification inquiry into a union's discriminatory representation in the bargaining unit in issue. The Board majority in *Bekins*, of which I was a member, found that such certification "would appear to be

sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment." 211 at 139. Nothing has occurred since that decision to undermine the validity of this conclusion. I therefore vigorously disagree with today's contrary holding of my colleagues.[74]

In my colleagues' view the language of Section 9(c)(1) requires the Board to certify a union even though its governing instruments (constitution, charter, bylaws, etc.) exclude from its membership black or female employees in the unit or permit black or female employees in the unit to become members only of a segregated local.[75] As a result of the Board's certification, the employer is required to bargain with the Union as the exclusive representative of all employees in the unit, minority employees who voted against the union can have no other representation, the

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[74]In earlier decisions the Board has held, on constitutional grounds, that discriminatory practices by a union required the denial of representation privileges. *Independent Metal Workers Union, Local No. 1 (Huges Tool Company),* 147 NLRB 1573 (1964); *Pioneer Bus Company, Inc.,* 140 NLRB 54 (1962).

[75]I do not mean to suggest that the present case involves this situation, but the effect of the majority's decision is to require certification of such a union by precluding any precertification inquiry into a union's discriminatory practices. In the present case, the objection to certification included the claim that the union excluded "persons from membership on the basis of race, alienage or national origin." Local 657, which was the subject of the Employer's certification objection in this case, has been found accountable for discriminatory practices in establishing seniority rosters in its collective-bargaining agreements with three other employers engaged in similar business in this same area. *Rodriguez* v. *East Texas Motor Freight, supra*; *Herrera* v. *Yellow Freight Systems, Inc., supra; Resendis* v. *Lee Way Motor Feight, Inc., supra.*

Union's status as exclusive bargaining representative cannot be challenged for a year, and there is a presumption that its status as exclusive bargaining representative continues after a year. My colleagues acknowledge "that certification of a labor organization confers substantial benefits" but nevertheless assert that these benefits which flow directly from the Board's certification do not support a discriminating union in its invidious discrimination. They do not, and cannot, explain how assistance to the union in the exclusive representation of unit employees does not amount to assistance in the union's discrimination when that representation is conducted in accordance with the union's discriminatory practices. It is no answer that at some uncertain future date, after the union with Board assistance has carried out its discriminatory practices, unfair labor practice proceedings may be instituted which will bring these activities to a halt. The fact of the matter is that until that day comes, if it ever does come, the Board has fostered invidious discrimination by the statutory agent.

The decision of the Supreme Court leave no room for such Government-supported discrimination. In *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), the Supreme Court made clear that the Constitution prohibited a labor organization, which was granted a statutory right to bargain exclusively for employees, from engaging in invidious discrimination in their representation. The decisions of the supreme Court have repeatedly invalidated action taken by Federal or state agencies which have the effect of furthering, supporting, or assisting discrimination in any form. See, e.g., *Bolling* v. *Sharpe*, 347 U.S. 498 (1954); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

Since the Board's certification grants a discriminating union the right of exclusive representation, together with various concomitant advantages, it seems that my colleagues close their eyes to the facts when they assert that certification does not assist a discriminating union in its discriminatory practices. As the Court stated in *N.L.R.B.* v. *Mansion House Center Management Corporation,* 473 F. 2d 471, 477 (CA 8, 1973), "Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices. Certainly such a degree of federal participation in the maintenance of racially discriminatory practices violates basic constitutional tenets."

In an attempt to rationalize their conclusion that the due process clause of the fifth amendment does not prohibit the Board's certification of a discriminating union, my colleagues assert that the view of the majority in *Bekins* that certification of a discriminating union violates constitutional restrictions misconstrued the Supreme Court delineation of the scope of prohibited state action. After reviewing a number of cases in which the Supreme Court held state action involved with invidious discrimination exceeded constitutional bounds, my colleagues state that such an involvement is found in circumstances, among others, where the Government authorized private discrimination or fostered and encouraged private discrimination. They conclude, however, that certification of a discriminating union does not sufficiently involve the Board in the union's invidiously discriminatory practices to render its action unconstitutional because "a certification is neither more nor less than an acknowledgment that a majority of the employees in

an appropriate bargaining unit have selected the union as their exclusive bargaining representative" and does not authorize the union to engage in discrimination.

This evaluation of the Board's involvement in the union's discriminatory practices is a patent understatement of the significant effects of certification. By certification the union becomes the statutory bargaining agent with statutory rights. Improper interference with the selection of the bargaining representative is the violation of "public, not private, rights." *Virginia Electric & Power Co.* v. *N.L.R.B.,* 319 U.S. 533, 543 (1943). The usual form of certification of representative provides that the "labor organization is the exclusive representative of all the employees in the . . . appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." The invidious discrimination of a discriminating union is practiced in the very areas to which the certification of a union relates. As previously noted, certification of a union confers the exclusive right to represent all employees in the bargaining unit, the right to be free from challenge for a year, and a presumption that its majority status continues after a year. Without the Board's certification a labor organization does not enjoy the rights of a statutory bargaining agent. Obviously, a union's status as the statutory bargaining agent enhances its position with respect to both the employer and the unit employees. By certifying a union which excludes blacks or women from membership or segregates them in a separate local, the Board directs the employer to bargain exclusively with this discriminating union as representative of the excluded or segregated blacks or women. Minorities do not have a protected right, separate from the certified representative, to engage in concerted activities to protest

discrimination by their employer. *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50 (1975). Certification is thus an integral part of the representation function in which the union practices discrimination and is patently direct participation and assistance by a Government agency, contrary to constitutional strictures, in the union's discriminatory representation. Accordingly, "[w]here a governmental agency recognizes such a union to be the bargaining representative it significantly becomes a willing participant in the union's discriminatory practices." *Mansion House, supra,* 473 F. 2d at 473. The Board's conferring the status of statutory bargaining agent upon a union which engages in invidious discrimination clearly fosters and supports the union's discriminatory practices and this constitutes the Board's involvement in them under the standards which my colleagues acknowledge but contend are not applicable here. As the Supreme Court stated in *Burton* v. *Wilmington Parking Authority, supra,* where the state authority merely leased space in a public building to a private restaurant which denied service to blacks, there existed "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."

The Board's decisions holding breach of the duty of fair representation to be an unfair labor practice, with which I of course fully agree, are no substitute for the disqualification of a discriminating union in a representation proceeding.The fifth amendment does not permit a Government agency to provide the instrument for practicing discrimination merely because at some uncertain future date the Board may have an opportunity to terminate this discrimination in unfair labor practice proceedings set in motion by the charges

of private parties if the General Counsel decides to file a complaint. The Board cannot initiate unfair labor practice proceedings. Moreover, for a variety of reasons, such proceedings may never be instituted notwithstanding the discriminatory exclusion of minorities from the union or from employment in the certified unit.

The effect of a union's exclusion of blacks or women from membership or their segregation in separate locals may discourage them from seeking or retaining employment with an employer who is compelled by the Board's certification to bargain exclusively with the discriminating union. An employer confronted with a certification may find it expedient to enter into a collective-bargaining agreement wiith a union which excludes blacks or women from employment. In these situations, the possibility of invidious discrimination being raised as an unfair labor practice is minimized or eliminated. The certification of the Board thus serves as an instrument for the perpetuation of invidious discriminatory practices. It is clear to me, therefore, that the due process clause of the fifth amendment requires that certification be denied whenever the evidence establishes that the labor organization's representation in the unit for which it requests certification will be infected with invidious discrimination.

My colleagues contend that certification of a union successful in an election is mandatory under the Act and that an administrative agency cannot pass upon the constitutionality of a statute whose obligation it is the agency's to administer. This argument is completely

devoid of mert.[76] Certainly an agency is not holding a statute unconstitutional when it decides to administer it in a constitutional manner. Direct commands in a statute are impliedly made subject to constitutional limitations. My colleagues would meet the problem of eliminating invidious discrimination by labor organizations through its power in unfair labor practice proceedings to remedy the union's breach of its duty of fair representation. But the National Labor Relations Act nowhere expressly imposes on the statutory bargaining agent a duty of fair representation. This doctrine, first enunciated by the Board in *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962), as my colleagues acknowldge,[77] was derived from the Supreme Court's decision in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); and *Wallace Corporation* v. *N.L.R.B.*, 323 U.S. 248 (1944). In these cases the Supreme Court held that a statutory duty of fair representation by the exclusive bargaining representative must be implied for constitutional reasons. Thus, in attacking the problem of invidious discrimination by reading into the statute a duty of fair representation,

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[76]In *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. at 198, the Supreme Court held that if a statute confers on a statutory .bargaining representative the right to discrimmate against members of the bargaining unit

> . . . constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.

[77]Member Fanning has not yet accepted *Miranda*.

my colleagues rely no less on constitutional requirements than they would if they held nondiscrimination to be a condition to certification. Similarly, in *Pioneer Bus Company, Inc.*, 140 NLRB 54 (1962), the Board took account of constitutional requirements in denying the benefits of its contract-bar doctrine to a discriminating union. And in *Independent Metal Workers Union, Local No. 1 (Hughes Tool Company)*, 147 NLRB 1573 (1964), the Board relied on constitutional doctrine for its holding that racial segregation in membership by a statutory bargaining representative cannot be countenanced by a Federal agency. *Miranda, Pioneer Bus,* and *Hughes Tool* are relied on approvingly by my colleagues. It is clear that the Board is required to interpret and apply the Act in a manner which will avoid offense to the Constitution and that in doing so it is not adjudicating the constitutionality of congressional enactments.

My colleagues' decision does further violence to constitutional doctrine in its suggestion that a discriminating union which wins an election should be certified because it may be preferred by minority employees as better than no union at all. The majority does not indicate how the minority employees' preference in this respect would be ascertained. Moreover, as to a discriminating union's being preferable to none at all, it might just as readily be claimed that segregated school systems should have been upheld because they were better than none at all and a state might refuse to support a desegregated system. The effect of my colleagues' position is that the Board can properly assist in the perpetuation of discriminatory representation because such representation might be preferred to no representation. No authority is cited for this bizarre suggestion and I am certain none can be found.

The constitutional impediment to certification of a discriminating union forecloses consideration of policy reasons for adopting a procedure which grants certification and postpones determination of disqualifying discrimination to a later date. But even if there were no such impediment, I find to be singularly lacking in substance the reasons advanced by my colleagues for postponing until after certification the determination of invidious discrimination questions. The principal concerns of my colleagues appear to be that employers will seize upon the opportunity to raise questions of discrimination as a device for delaying certification and collective bargaining, that they will present evidence of discrimination of a character that does not establish that the particular local involved will engage in discrimination in the unit for which certification is sought, and that in the certification stage there is no opportunity for an adversary hearing which will permit the question of discrimination to be determined properly.

In attempted support of their argument that employers will use objections to certification based on discrimination as a tool for delaying or avoiding collective bargaining, my colleagues cite as illustrations cases in which the evidence of a labor organization's discriminatory conduct fell far short of establishing that it would engage in discrimination in the unit for which certification was currently being sought. If there is a propensity for employers to submit inadequate evidence of discrimination in support of an objection to certification, this is hardly relevant to the question whether certification should be denied when conclusive evidence of such discrimination is presented. I agree with my colleagues that disqualifying evidence of discrimination must relate to the union's future course

of conduct in the unit involved in the representation proceeding and must do more than provide a basis for speculation as to the union's conduct as the certified bargaining representative. My colleagues apparently assume that it is impossible to prove disqualifying discrimination before certification. But certainly where a union's governing instruments require it to exclude minorities from membership or segregate them in separate locals in the unit for which certification is sought, there is irrebuttable evidence of invidious discrimination. What lesser evidence will satisfy the Board is a matter for case-by-case determination. To hold, as my colleagues do, that because some evidence will be insufficient no evidence will be permitted, is a perversion of the administrative process. Nor can it be persuasively maintained that the mere opportunity to present inadequate evidence of discrimination will unduly delay the bargaining process. The more than 2-1/2 years' experience with the *Bekins* decision has shown that our Regional Offices and the Board itself have been able to deal expeditiously with spurious objections to certification based on alleged discrimination, and that no undue delays have occurred. See, e.g., *Grants Furniture Plaza, Inc. of West Palm Beach, Fla.*, 213 NLRB 410 (1974).[78]

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[78]In *Grants*, the Board adopted the Regional Director's recommendation that the employer's objection to certification on the ground that the union was guilty of discriminatory practices be overruled without a hearing. The Board held that statistical evidence of the composition of the union's membership without evidence of who controlled hiring practices and evidence that a complaint had been filed by the Department of Justice alleging discrimination were not sufficient to warrant a hearing and certified the union.

My colleagues further claim that determination of an invidious discrimination objection should be made in an adversary proceeding which is not available during the representation stage of a case. This is clearly in error. If a genuine issue of discrimination is presented as an objection to certification after an election, the procedure contemplated by *Bekins* would be to designate a Hearing Officer to conduct a hearing on the question of discrimination and any other objections to the election which involved genuine issues of fact. At this hearing all interested parties would have an opportunity to present evidence, cross-examine witnesses, submit briefs, and, if desired, to participate in oral argument. After the Hearing Officer files his report and recommendations, the parties may file exceptions and briefs with the Board after consideration of which the Board will render its decision. If certification is granted, the employer may obtain judicial review in a court of appeals after the summary judgment finding of an 8(a)(5) violation based upon its refusal to bargain. *May Department Stores Co. d/b/a Famous-Barr Co.* v. *N.L.R.B.*, 326 U.S. 376 (1945). If certification is denied, a union may obtain judicial review by means of an independent action in a United States District Court. *Miami Newspaper Printing Pressman's Union Local 46* v. *McCulloch*, 322 F. 2d 993 (C.A.D.C., 1963). These opportunities for hearing and review are obviously adversary in character (see *Miami Newspaper case*, *supra* at 998) and meet all the requirements of due process.

To conclude, the *Bekins* decision properly holds that certification of a discriminating union supports and involves a Government agency in the discrimination in

violation of the due process clause of the fifth amendment. Policy arguments are, accordingly, irrelevant but, in any event, those advanced by my colleagues are entirely speculative and not supported by experience under the Act. I therefore consider the overruling of *Bekins* to constitute clear legal error.

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